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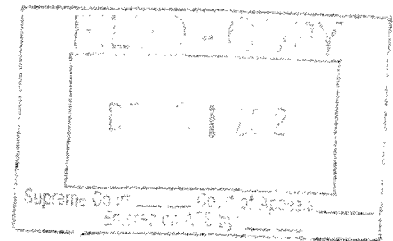
IN THE SUPREME COURT OF THE STATE OF IDAHO

ADRIEL AYON NUNEZ,
Petitioner/Appellant,

vs.

STATE OF IDAHO,
Respondent.

S.Ct. No. 39966



OPENING BRIEF OF APPELLANT

Appeal from the District Court of the Fifth Judicial District of the State of Idaho
In and For the County of Twin Falls

HONORABLE RANDY J. STOKER,
District Judge

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II. STATEMENT OF THE CASE

A. Nature of the Case

This is an appeal from the denial of post-conviction relief. The case should be remanded for further proceedings because the trial court erroneously denied the Petitioner's motion for appointment of counsel.

B. Procedural History

Mr. Nunez was convicted by a jury of trafficking in methamphetamine. He was sentenced to an indeterminate term of 25 years with 15 years fixed. He filed an appeal but his conviction was affirmed. *State v. Nunez*, Docket No. 30114. His petition for review was denied.

He then filed a petition for post-conviction relief. Some of the claims were summarily dismissed, but some went to an evidentiary hearing. Those remaining claims were eventually denied and Mr. Nunez appealed. The district court was affirmed and Mr. Nunez's petition for review was denied. *Nunez v. State*, Docket No. 33224.

On August 3, 2011, Mr. Nunez filed, under the criminal case number, a pro se pleading entitled "A Verified Motion for Telephonic Hearing With Notice. In Re: U.N. Treaty Violations." A civil docket number was assigned by the Clerk of the Court.¹ R 6.

The pleading, among other things, alleged that the state laboratory had engaged in misconduct in the testing of the alleged controlled substances. R 12.

On August 3, 2011, the Court appointed the Twin Falls County Public Defender as counsel to represent Mr. Nunez and set the matter for a Pretrial Conference on November 21 and

¹ This document was most likely prepared by inmate Steven Priest. See R 13, 47. Mr. Nunez does not understand spoken English, see T pg. 10, ln. 14-16, and the pleadings contain many idiomatic expressions that a non-English speaker would not be likely to use.

an Evidentiary Hearing on December 19. R 65-66.

The state construed the pleading as a Successive Petition for Post-Conviction Relief and filed an Answer on August 8, 2011. R 67-70.

On August 22, 2011, the Court filed a Notice of Intent to Dismiss Successive Post-Conviction Petition. R 71. The Court gave notice of its intent to dismiss all but one of the claims due to untimeliness and to dismiss the remaining claim for failing to assert facts which would entitle him to relief. R 80. The Court served a copy of its notice to Marilyn Paul, the Twin Falls County Public Defender. R 81.

On August 31, 2011, Mr. Nunez filed a pro se Notice of Fundamental Reversible Error, Objection, and Remedial Actions Being Sought. R 83. In that pleading, Mr. Nunez asserted his right to proceed pro se. R 82-87. Mr. Nunez did ask for appointment of standby counsel. R 89.

On September 16, 2011, the court issued a Second Notice of Intent to Dismiss Successive Post-Conviction Petition. The second notice repeated the analysis of the first notice, but was mailed to both Mr. Nunez and “his appointed counsel,” the Twin Falls Public Defender. R 111. The court gave Mr. Nunez until October 6 to respond.

On September 21, the Twin Falls Public Defender filed a motion to extend time, which the court granted. R 112, 115.

On October 6, Mr. Nunez filed a Notice of Error, Objection and Request for Relief. R 117. Mr. Nunez opposed the court’s notice of intent to dismiss and asked that the Court set the matter for an evidentiary hearing and to order the state to produce discovery relating to the state laboratory. R 128-129. On November 1, the Court dismissed all the claims in the petition, except for the issue of improper drug testing. It informed the parties that the December 19

evidentiary hearing would be “limited to the claimed improper drug testing issue.” Further, it ordered that the “evidentiary hearing shall be bifurcated to permit the State to meet any evidence submitted by Plaintiff at the hearing. Scheduling of the State’s presentation of evidence, if any, will be determined following the presentation of Plaintiff’s case.” R 240.

Only five days later, Mr. Nunez asked the Court to grant summary disposition in his favor on the remaining claim. He wrote: “I’m a humble man. The fantastic thoughts of pulling into your Court and single-handedly crossing pens with the Great State of Idaho, appears more than a little fantastic.” R 283. Possibly realizing summary disposition was not likely to be granted, Mr. Nunez also informed the Court that “the petitioner shall hereby withdraw his pro se status at this time, in aid of Counsel’s timely preparation for the hearing and ever cognizant of the stress and strains such efforts require.” He continued, “The Office of the Public Defender is urged to consider the premises, create a witness list and issue subpoena’s [sic] now, in time for the hearing.” R 303-04.

Two weeks later, on November 21, a pretrial conference was held outside the presence of the Mr. Nunez. R 307. Ms. Paul asked that the pretrial conference be continued because she had not timely provided the Court with a motion to transport Mr. Nunez from prison and because “Mr. Nunez basically considers himself to be representing himself pro se, and . . . he views me as not empowered to represent him.” T pg. 5, ln. 17-22. The Court denied the request. R. 307. No mention was made by either standby counsel, the state or the Court of the November 6 pleading where Mr. Nunez withdrew his pro se status and urged standby counsel to prepare for the hearing. The Court’s comments show that it was still under the impression that Mr. Nunez intended to represent himself at the evidentiary hearing. (“He elects to represent himself. I

issued an order transporting him and certainly he can present his case at that time.” T pg. 6, ln. 19-21. “Other than to let him put his evidence on, I don’t know what else I can do to assist him.” T pg. 7, ln. 23-25.) The Court did not inquire whether standby counsel had made any preparations for the evidentiary hearing, such as issuing the requested subpoenas.

On December 1, Mr. Nunez filed a Motion and Affidavit for Appointment of Counsel. R 308. He alleged that he was not able to represent himself because he needed assistance in formulating a witness list, subpoenaing witnesses, gathering evidence and cross-examining state witnesses. No action was taken on the motion until the time of the evidentiary hearing on December 19. At that time, Mr. Nunez was present and was assisted by an interpreter. Ms. Paul appeared as standby counsel. T pg. 10, ln 14-21.

Mr. Nunez, though the interpreter, reminded the Court that he had “asked for an attorney and I sent a letter so that she² could represent me.” T pg. 11, ln. 10-13. The Court stated that it was aware of the motion but “[i]t has never been noticed for a hearing.” T pg. 11, ln. 24 - pg. 12, ln. 1. The Court asked Mr. Nunez why it should appoint counsel “at this late date when you have told me for months now that you wish to represent yourself in this case?” T pg. 12, ln. 2-7. Mr. Nunez told the Court that he was “defending [himself] this whole time because I didn’t have an attorney, but then I finally did ask for the attorney to be given to me.” T pg. 12, ln. 5-8.

Standby counsel did not attempt to assist Mr. Nunez or even remain neutral. Instead, she agreed with the Court that it was “clear that Mr. Nunez wanted to represent himself in this case [with her] function in this case solely as standby counsel.” T pg. 12, ln. 19-23; pg. 13, ln. 2-6.

² “She” presumably meaning Ms. Paul. There is no letter in the record and Mr. Nunez likely means the motion for appointment of counsel.

Ms. Paul did not alert the Court to Mr. Nunez's November 6 pleading where he informed the Court that "the petitioner shall hereby withdraw his pro se status at this time" and where he asked standby counsel to prepare for the hearing by creating a witness list and issuing subpoenas for the hearing. R 303-04. She did not remind the Court that nearly three weeks had passed since Mr. Nunez filed his motion for appointment of counsel, nor did she suggest to the Court that standby counsel bore some of the responsibility for not noticing the motion for a hearing. She also failed to alert the Court that she had not subpoenaed any witnesses for the evidentiary hearing per Mr. Nunez's request, which would have been within her appointment as standby counsel. Finally, she did not argue to the Court that she might have taken steps to prepare for the hearing in her "standby counsel" capacity since she had been aware since December 1, when the Motion For Appointment of Counsel was filed, that Mr. Nunez did not believe himself to be competent to prosecute the case.

During the hearing, the Court noted that it could not discern the basis for the petition and had granted Mr. Nunez an evidentiary hearing out of an abundance of caution. T pg. 13, ln. 11-17. In light of that, the Court found it would not be appropriate to appoint counsel. The Court first found the filing was untimely. The Court deemed that Mr. Nunez's prior insistence on proceeding pro se was a waiver of the right to seek appointed counsel. T pg. 25, ln. 20 - pg. 26, ln. 12. Second, the Court denied appointed counsel because it found that a reasonable person would not be willing to spend his or her own money on prosecuting the petition. T pg. 26, ln. 13 - pg. 27, ln. 1.

Immediately after denying the request for appointment of counsel, the Court asked Mr. Nunez if he had any witnesses or if he wished to present his own testimony in support of the

petition. Mr. Nunez replied that he did not have any evidence besides what had already been judicially noticed by Court. T pg. 27, ln. 2-11. After considering the evidence before it, the Court dismissed the remaining claim. T pg. 31, ln. 22-25; R 312. (Mr. Nunez's copy of the Judgment was returned as undeliverable, perhaps because no postage appears to have been attached. R 314.)

However, Mr. Nunez filed a timely I.R.C.P. 60(b) motion. R 321. And the Court granted relief by filing an Amended Judgment Denying Appointment of Counsel and Dismissing Claims with Prejudice. R 334. This appeal timely followed. R 182-184.

III. ISSUES PRESENTED ON APPEAL

1. Whether the court abused its discretion in denying Mr. Nunez's motion for appointment of counsel on the grounds that it was untimely?
2. Did the court err by denying Mr. Nunez's motion for appointment of counsel without first giving him notice of why the Court found the petition to be frivolous and allowing him an opportunity to respond?

IV. ARGUMENT

A. Introduction

If a post-conviction applicant is unable to pay for the expenses of representation, the trial court may appoint counsel to represent the applicant in preparing the application, in the trial court and on appeal. I.C. § 19-4904. The decision to grant or deny a request for court-appointed counsel lies within the discretion of the district court. *Charboneau v. State*, 140 Idaho 789, 792, 102 P.3d 1108, 1111 (2004). In determining whether to appoint counsel pursuant to Section 19-4904, the district court should determine if the applicant is able to afford counsel and whether

the situation is one in which counsel should be appointed to assist the applicant. *Id.* In its analysis, the district court should consider that applications filed by a pro se applicant may be conclusory and incomplete. *See id.*, at 792–93, 102 P.3d at 1111–12. Facts sufficient to state a claim may not be alleged because they do not exist or because the pro se applicant does not know the essential elements of a claim. *Id.* Thus, if an applicant alleges facts that raise the possibility of a valid claim, the district court should appoint counsel in order to give the applicant an opportunity to work with counsel and properly allege the necessary supporting facts. *Charboneau*, 140 Idaho at 793, 102 P.3d at 1112.

B. The Court Abused Its Discretion in Denying the Motion on Timeliness Grounds

In reviewing the denial of a motion for appointment of counsel in post conviction proceedings, the appellate Court will not set aside the trial court's findings of fact unless they are clearly erroneous. As to questions of law, the Court will exercise free review. *Brown v. State*, 135 Idaho at 678, 23 P.3d 140. When a trial court's discretionary decision is reviewed on appeal, the appellate court conducts a multi-tiered inquiry to determine: 1) whether the lower court correctly perceived the issue as one of discretion; 2) whether the lower court acted within the boundaries of such discretion and consistently with any legal standards applicable to the specific choices before it; and 3) whether the court reached its decision by an exercise of reason. *State v. Hedger*, 115 Idaho 598, 600, 768 P.2d 1331, 1333 (1989); *Cowger v. State*, 132 Idaho 681, 683-84, 978 P.2d 241, 243-44 (Ct. App. 1999).

Here, the Court's finding that the request for counsel was untimely was clearly erroneous. Mr. Nunez first renounced his right to proceed pro se and pleaded for the assistance of standby counsel on November 6, 2011. R 283. The Court received that pleading on November 9, forty

days before the scheduled evidentiary hearing. (As standby counsel, Ms. Paul should have begun to prepare for the evidentiary at this point as she knew Mr. Nunez did not want to represent himself any longer.) He then filed a formal motion for appointment of counsel on December 1, still 18 days before the hearing. Ms. Paul could have been appointed and even been ready to present evidence by the scheduled hearing date. If she could not been ready in 18 days, she could have sought a continuance.

Further, the Court's did not reach its conclusion by an exercise of reason. There was no pressing reason to force Mr. Nunez to proceed pro se on December 19. No witnesses would be inconvenienced or put to expense because none had been subpoenaed by Mr. Nunez or Ms. Paul. The state knew that it was not required to present any evidence on that day due to the Court's previous decision to bifurcate the proceedings. So, all the Court gained by requiring Mr. Nunez to proceed pro se was the avoidance of those small inconveniences that would come with a short delay in the proceedings. It was unreasonable for the Court to conclude that such a minor gain in judicial efficiency outweighed Mr. Nunez's statutory right to counsel.

Finally, the Court's conclusion that Mr. Nunez had "waived" his statutory right to counsel by not asserting it earlier was not reasonable because he did assert it six weeks prior to the hearing. The definition of "waiver" is "the voluntary relinquishment or abandonment — express or implied — of a legal right or advantage." Black's Law Dictionary (9th ed. 2009). It may be that, at one point, assuming Mr. Nunez was actually aware of the contents of the pleadings prepared by Mr. Priest, he wanted to proceed with the assistance of his jail-house lawyer instead of trained counsel. However, once it became clear that the matter would not be resolved on the pleadings and was heading to an evidentiary hearing where Mr. Priest would not be present to

assist him, Mr. Nunez realized he was out of his depth and knew he needed help. R 283 (“I’m a humble man.”).

Moreover, Mr. Nunez took affirmative steps to obtain counsel. However, standby counsel did not do anything to protect her client’s interests. Ms. Paul did not alert the Court prior to the evidentiary hearing that Mr. Nunez had withdrawn his pro se status on November 6. She did not do anything to prepare for the hearing. She did not set Mr. Nunez’s formal motion for appointment of her for a hearing. She did not prepare for the hearing. Mr. Nunez could have reasonably believed that Ms. Paul would be ready to proceed on December 19, given his earlier requests for her assistance. Thus, it was unreasonable for the Court to conclude that Mr. Nunez’s attempts to obtain counsel were untimely in light of his efforts and standby counsel’s failure to act on his behalf.

C. The Court Erred in Denying the Motion for Counsel Without Giving Notice as to Why the Court Believed the Claims to be Frivolous

While the Court here determined that a reasonable person would not be willing to bring Mr. Nunez’s claim at his or her own expense, it erred because it did not give prior notice of its determination so that Mr. Nunez would have a chance to respond. The Supreme Court observed in *Brown v. State*, 135 Idaho 676, 23 P.3d 138 (2001) that:

As stated above, a needy applicant for post-conviction relief is entitled to court-appointed counsel unless the trial court determines that the post-conviction proceeding is frivolous. Idaho Code § 19–852(b)(3) sets forth the standard for determining whether or not a post-conviction proceeding is frivolous. It is frivolous if it is “not a proceeding that a reasonable person with adequate means would be willing to bring at his own expense.” When applying that standard to pro se applications for appointment of counsel, the trial court should keep in mind that petitions and affidavits filed by a pro se petitioner will often be conclusory and incomplete. Although facts sufficient to state a claim may not be alleged because they do not exist, they also may not be alleged because the pro se

petitioner simply does not know what are the essential elements of a claim. It is essential that the petitioner be given adequate notice of the claimed defects so he has an opportunity to respond and to give the trial court an adequate basis for deciding the need for counsel based upon the merits of the claims. If the court decides that the claims in the petition are frivolous, the court should provide sufficient information regarding the basis for its ruling to enable the petitioner to supplement the request with the necessary additional facts, if they exist. Although the petitioner is not entitled to have counsel appointed in order to search the record for possible nonfrivolous claims, he should be provided with a meaningful opportunity to supplement the record and to renew his request for court-appointed counsel prior to the dismissal of his petition where, as here, he has alleged facts supporting some elements of a valid claim.

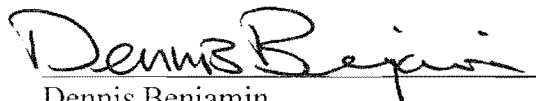
135 Idaho at 679, 23 P.3d at 141.

Thus, under *Brown*, even if a court decides that the claims in the petition are frivolous, it should provide sufficient notice regarding the basis for its ruling to enable the petitioner to provide additional facts, if they exist, to demonstrate the existence of a non-frivolous claim. *See also Swader v. State*, 143 Idaho 651, 653-54, 152 P.3d 12, 15-16 (2007); *Charboneau*, 140 Idaho at 793, 102 P.3d at 1112. The Court here did not give advance notice to Mr. Nunez or a meaningful opportunity to respond. Thus, the order denying counsel should be vacated.

V. CONCLUSION

This Court should vacate the order denying counsel, vacate the order denying the post-conviction petition and remand for further proceedings.

Submitted this 21st of December, 2012.

A handwritten signature in black ink, appearing to read "Dennis Benjamin". The signature is fluid and cursive, with a horizontal line drawn underneath the name.

Dennis Benjamin
Attorney for Appellant

CERTIFICATE OF SERVICE

I CERTIFY that on December 21, 2012, I caused two true and correct copies of the foregoing document to be:

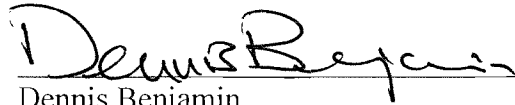
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